

**ASSEMBLY BILL**

**No. 1195**

**Introduced by Assembly Member Torlakson**

February 28, 1997

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An act to amend Sections 25356.1 and 25356.3 of, and to add Sections 25319.6 and 25324.5 to, the Health and Safety Code, relating to hazardous substances.

LEGISLATIVE COUNSEL'S DIGEST

AB 1195, as introduced, Torlakson. Hazardous substance: liability.

Existing law, the Carpenter-Presley-Tanner Hazardous Substance Account Act, generally in effect until July 1, 1998, imposes liability for hazardous substance removal or remedial actions and requires the Department of Toxic Substances Control to adopt, by regulation, criteria for the selection and for the priority ranking of hazardous substance release sites for removal or remedial action under the act. The act requires the department, or, if appropriate, the California regional water quality control board, to prepare or approve remedial action plans for each listed site and provides for an arbitration process for the apportionment of liability for removal or remedial actions. A remedial action plan is required to include, among other things, a nonbinding preliminary allocation of responsibility among all identifiable potentially responsible parties at a site.

Any potentially responsible party with an aggregate alleged liability in excess of 50% of the costs of the removal or remedial action is allowed to convene an arbitration

proceeding within 15 days from the date of issuance of a final remedial action plan.

This bill would additionally require, for any remedial action plan prepared or approved on or after January 1, 1998, a statement of the reasons for allocating responsibility to each respective potentially responsible party, including, but not limited to, specified factors pertaining to the amount of hazardous substance for which the potentially responsible party may be responsible, the degree of the toxicity of the hazardous substance, and the degree of involvement of the potentially responsible party.

The bill would decrease the amount of aggregate alleged liability for the costs of the removal or remedial action, for which a potentially responsible party is authorized to convene an arbitration proceeding, to an excess of 8%. The bill would additionally allow, on and after January 1, 1998, until April 1, 1998, any potentially responsible party with an aggregate liability in excess of 8% of the costs of any removal and remedial action, as provided in a final remedial action plan issued by the department or regional board before January 1, 1998, who was not previously eligible to file an appeal, to convene an arbitration proceeding.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 25319.6 is added to the Health  
2 and Safety Code, to read:  
3 25319.6. "Regional board" means a California  
4 regional water quality control board.  
5 SEC. 2. Section 25324.5 is added to the Health and  
6 Safety Code, to read:  
7 25324.5. "State board" means the State Water  
8 Resources Control Board.  
9 SEC. 3. Section 25356.1 of the Health and Safety Code  
10 is amended to read:  
11 25356.1. (a) ~~For purposes of this section, "regional~~  
12 ~~board" means a California regional water quality control~~

~~board and “state board” means the State Water Resources Control Board.~~

~~(b)~~ Except as provided in subdivision (h), the department, or, if appropriate, the regional board, shall prepare or approve remedial action plans for all sites listed pursuant to Section 25356.

~~(e)~~

*(b) (1)* A potentially responsible party may request the department or the regional board, when appropriate, to prepare or approve a remedial action plan for any site not listed pursuant to Section 25356, if the department or the regional board determines that a removal or remedial action is required to respond to a release of a hazardous substance. The department or the regional board shall respond to a request to prepare or approve a remedial action plan within 90 days *from the date* of receipt. ~~This subdivision~~

*(2) Paragraph (1)* does not affect the authority of any regional board to issue and enforce a cleanup and abatement order pursuant to Section 13304 of the Water Code or a cease and desist order pursuant to Section 13301 of the Water Code.

~~(d)~~

*(c)* All remedial action plans prepared or approved pursuant to this section shall be based upon Section 25350, Subpart F of the National Oil and Hazardous Substances Pollution Contingency Plan (40 C.F.R. 300.61 et seq.), and any amendments thereto, and upon all of the following factors, to the extent that these factors are consistent with ~~these~~ *those* federal regulations and do not require a less stringent level of cleanup than ~~these~~ *those* federal regulations:

*(1)* Health and safety risks posed by the conditions at the site. When considering these risks, the department or the regional board shall consider scientific data and reports ~~which~~ *that* may have a relationship to the site.

*(2)* The effect of contamination or pollution levels upon present, future, and probable beneficial uses of contaminated, polluted, or threatened resources.

1 (3) The effect of alternative remedial action measures  
2 on the reasonable availability of groundwater resources  
3 for present, future, and probable beneficial uses. The  
4 department or the regional board shall consider the  
5 extent to which remedial action measures are available  
6 ~~which~~ *that* use, as a principal element, treatment that  
7 significantly reduces the volume, toxicity, or mobility of  
8 the hazardous substances, as opposed to remedial actions  
9 ~~which~~ *that* do not use this treatment. The department or  
10 the regional board shall not select remedial action  
11 measures ~~which~~ *that* use offsite transport and disposal of  
12 untreated hazardous substances or contaminated  
13 materials if practical and cost-effective treatment  
14 technologies are available.

15 (4) Site specific characteristics, including the potential  
16 for offsite migration of hazardous substances, the surface  
17 or subsurface soil, and the hydrogeologic conditions, as  
18 well as preexisting background contamination levels.

19 (5) Cost-effectiveness of alternative remedial action  
20 measures. In evaluating the cost-effectiveness of  
21 proposed alternative remedial action measures, the  
22 department or the regional board shall consider, to the  
23 extent possible, the total short-term and long-term costs  
24 of ~~these~~ *those* actions and shall use, as a major factor,  
25 whether the deferral of a remedial action will result, or  
26 is likely to result, in a rapid increase in cost or in the  
27 hazard to public health or the environment posed by the  
28 site. Land disposal shall not be ~~deemed~~ *considered* the  
29 most cost-effective measure merely on the basis of lower  
30 short-term cost.

31 (6) The potential environmental impacts of  
32 alternative remedial action measures, including, but not  
33 limited to, land disposal of the untreated hazardous  
34 substances as opposed to treatment of the hazardous  
35 substances to remove or reduce its volume, toxicity, or  
36 mobility prior to disposal.

37 ~~(e)–~~

38 *(d)* A remedial action plan prepared or approved  
39 pursuant to this section shall include a statement of  
40 reasons setting forth the basis for the removal and



1 remedial actions selected. ~~The statement shall include an,~~  
2 *which shall include all of the following:*

3 (1) An evaluation of each proposed alternative  
4 submitted to, or prepared by, the department or the  
5 regional board for a particular site. ~~The statement shall~~  
6 ~~also include an~~

7 (2) An evaluation of the consistency of the removal  
8 and remedial actions proposed by the plan with the  
9 federal regulations and factors specified in subdivision  
10 ~~(d)~~ (c) and ~~shall set forth~~ the reasons for rejection of  
11 alternative removal and remedial actions. ~~The statement~~  
12 ~~shall also include a~~

13 (3) A nonbinding preliminary allocation of  
14 responsibility among all identifiable potentially  
15 responsible parties at a particular site, including those  
16 parties ~~which~~ *who* may have been released, or may  
17 otherwise be immune, from liability pursuant to this  
18 chapter or any other provision of law. ~~Before~~

19 (4) *For all remedial action plans prepared or*  
20 *approved on and after January 1, 1998, a statement of the*  
21 *reasons for allocating responsibility to each respective*  
22 *potentially responsible party, including, but not limited*  
23 *to, any of the following reasons:*

24 (A) *The amount of hazardous substance for which the*  
25 *potentially responsible party may be responsible.*

26 (B) *The degree of the toxicity of the hazardous*  
27 *substance.*

28 (C) *The degree of involvement of the potentially*  
29 *responsible party in the generation, transportation,*  
30 *treatment, or disposal of the hazardous substance.*

31 (e) *Before* adopting a final remedial action plan, the  
32 department or the regional board shall prepare or  
33 approve a draft remedial action plan and shall do all of the  
34 following:

35 (1) Circulate the draft plan for at least 30 days for  
36 public comment.

37 (2) Notify affected ~~local and~~ *state and local* agencies of  
38 the removal and remedial actions proposed in the  
39 remedial action plan and publish a notice in a newspaper  
40 of general circulation in the area affected by the draft

1 remedial action plan. ~~The department or the regional~~  
2 ~~board shall also post~~

3 (3) Post notices in the location where the proposed  
4 removal or remedial action would be located and shall  
5 notify, by direct mailing, the owners of property  
6 contiguous to the site addressed by the plan, as shown in  
7 the latest equalized assessment roll.

8 ~~(3)–~~

9 (4) Hold one or more meetings with the lead and  
10 responsible agencies for the removal and remedial  
11 actions, the potentially responsible parties for the  
12 removal and remedial actions, and the interested public,  
13 to provide the public with the information ~~which that~~ is  
14 ~~necessary~~ needed to address the issues—~~which that~~  
15 concern the public. The information to be provided shall  
16 include an assessment of the degree of contamination, the  
17 characteristics of the hazardous substances, an estimate  
18 of the time required to carry out the removal and  
19 remedial actions, and a description of the proposed  
20 removal and remedial actions.

21 ~~(4)–~~

22 (5) Comply with Section 25358.7.

23 (f) After complying with ~~subdivision~~ subdivisions (d)  
24 and (e), the department or the regional board shall  
25 review and consider any public comments, and shall  
26 revise the draft plan, if appropriate. The department or  
27 the regional board shall then issue the final remedial  
28 action plan.

29 (g) (1) A potentially responsible party named in the  
30 final remedial action plan issued by the department or  
31 the regional board may seek judicial review of the final  
32 remedial action plan by filing a petition for writ of  
33 mandate pursuant to Section 1085 of the Code of Civil  
34 Procedure within 30 days ~~after~~ from the date that the final  
35 remedial action plan is issued by the department or the  
36 regional board. Any other person who has the right to  
37 seek judicial review of the final remedial action plan by  
38 filing a petition for writ of mandate pursuant to Section  
39 1085 of the Code of Civil Procedure shall do so within one

1 year ~~after~~ *from the date that* the final remedial action plan is issued. ~~No~~

3 (2) *No* action may be brought by a potentially responsible party to review the final remedial action plan if the petition for writ of mandate is not filed within 30 days ~~of~~ *from* the date that the final remedial action plan was issued. ~~No~~

8 (3) *No* action may be brought by any other person to review the final remedial action plan if the petition for writ of mandate is not filed within one year ~~of~~ *from* the date that the final remedial action plan was issued. The filing of a petition for writ of mandate to review the final remedial action plan shall not stay any removal or remedial action specified in the final plan.

15 ~~(2)~~

16 (4) For purposes of judicial review, the court shall uphold the final remedial action plan if the plan is based upon substantial evidence available to the department or the regional board, as the case may be.

20 ~~(3)~~

21 (5) This subdivision does not prohibit the court from granting any appropriate relief within its jurisdiction, including, but not limited to, enjoining the expenditure of funds pursuant to paragraph (2) of subdivision (b) of Section 25385.6.

26 (h) (1) This section does not require the department or a regional board to prepare a remedial action plan if conditions ~~present~~ at a site present an imminent or substantial endangerment to the public health and safety or to the environment or, if the department, a regional board, or a responsible party takes a removal action at a site and the estimated cost of the removal action is less than one million dollars (\$1,000,000). The department or a regional board shall prepare or approve a removal action workplan for all sites where a nonemergency removal action is proposed and where a remedial action plan is not required. For sites where removal actions are planned and are projected to cost less than one million dollars (\$1,000,000), the department or a regional board shall make the local community aware of the hazardous

1 substance release site and shall prepare, or direct the  
2 parties responsible for the removal action to prepare, a  
3 community profile report to determine the level of public  
4 interest in the removal action. Based on the level of  
5 expressed interest, the department or regional board  
6 shall take appropriate action to keep the community  
7 informed of project activity and to provide opportunities  
8 for public comment, which may include conducting a  
9 public meeting on proposed removal actions.

10 (2) A remedial action plan is not required pursuant to  
11 subdivision (b) if the site is listed on the National Priority  
12 List by the Environmental Protection Agency pursuant  
13 to the federal act, if the department or the regional board  
14 concurs with the remedy selected by the Environmental  
15 Protection Agency's record of decision. The department  
16 or the regional board may sign the record of decision  
17 issued by the Environmental Protection Agency if the  
18 department or the regional board concurs with the  
19 remedy selected.

20 (3) The department may waive the requirement that  
21 a remedial action plan meet the requirements specified  
22 in subdivision ~~(d)~~ (c) if all of the following apply:

23 (A) The responsible party adequately characterizes  
24 the hazardous substance conditions at a site listed  
25 pursuant to Section 25356.

26 (B) The responsible party submits to the department,  
27 in a form acceptable to the department, all of the  
28 following:

29 (i) A description of the techniques and methods to be  
30 employed in excavating, storing, handling, transporting,  
31 treating, and disposing of materials from the site.

32 (ii) A listing of the alternative remedial measures  
33 ~~which~~ *that* were considered by the responsible party in  
34 selecting the proposed removal action.

35 (iii) A description of methods that will be employed  
36 during the removal action to ensure the health and safety  
37 of workers and the public during the removal action.

38 (iv) A description of prior removal actions with similar  
39 hazardous substances and with similar public safety and  
40 environmental considerations.





1 (C) The department determines that the remedial  
2 action plan provides protection of human health and  
3 safety and for the environment at least equivalent to that  
4 which would be provided by a remedial action plan  
5 prepared in accordance with subdivision (c).

6 (D) The total cost of the removal action is less than two  
7 million dollars (\$2,000,000).

8 (4) For purposes of this section, the cost of a removal  
9 action includes the cleanup ~~of~~ *or* removal of released  
10 hazardous substances from the environment or the taking  
11 of other actions ~~which that~~ are necessary to prevent,  
12 minimize, or mitigate damage ~~which that~~ may otherwise  
13 result from a release or threatened release, as further  
14 defined by Section 9601 (23) of Title 42 of the United  
15 States Code.

16 (5) Paragraph (2) of this subdivision does not apply to  
17 a removal action paid from the Hazardous Substance  
18 Cleanup Fund.

19 (i) Article 2 (commencing with Section 13320), Article  
20 3 (commencing with Section 13330), Article 5  
21 (commencing with Section 13350), and Article 6  
22 (commencing with Section 13360) of Chapter 5 of  
23 Division 7 of the Water Code apply to any action or failure  
24 to act by a regional board pursuant to this section.

25 SEC. 4. Section 25356.3 of the Health and Safety Code  
26 is amended to read:

27 25356.3. (a) (1) The department or the regional  
28 ~~water quality control~~ board shall serve a copy by mail of  
29 the draft remedial action plan upon all potentially  
30 responsible parties identified in the plan. ~~Within~~

31 (2) *Except as provided in paragraph (3), within 15*  
32 *days after the issuance of a final remedial action plan, any*  
33 *potentially responsible parties with aggregate alleged*  
34 *liability in excess of 50 8 percent of the costs of removal*  
35 *and remedial action, as set forth in the statement of*  
36 *reasons issued pursuant to paragraph (4) of subdivision*

37 (d) of Section 25356.1, but excluding any costs ~~which that~~  
38 are the subject of an agreement under which any party  
39 agrees to assume liability for those costs, may convene an

1 arbitration proceeding by agreeing to submit to binding  
2 arbitration by the panel. ~~The~~

3 (3) *On and after January 1, 1998, until April 1, 1998, any*  
4 *potentially responsible party with an aggregate liability*  
5 *in excess of 8 percent of the costs of any removal and*  
6 *remedial action, as provided in a final remedial action*  
7 *plan issued by the department or regional board pursuant*  
8 *to subdivision (f) of Section 25356.1 before January 1,*  
9 *1998, who was not eligible to file an appeal pursuant to this*  
10 *section, as it read prior to the effective date of the act*  
11 *adding this paragraph, may convene an arbitration*  
12 *proceeding by agreeing to submit to binding arbitration*  
13 *by the panel.*

14 (4) *The filing of a demand to convene an arbitration*  
15 *panel shall not stay any removal or remedial actions*  
16 *specified in the plan. If*

17 (5) *If an arbitration panel is convened pursuant to this*  
18 *section, any other potentially responsible party may elect*  
19 *to submit to binding arbitration by the panel. Any person*

20 (6) *Any potentially responsible party submitting to*  
21 *arbitration under this section shall agree not to contest*  
22 *the fact of liability in the arbitration. The*

23 (7) *The panel shall, and the potentially responsible*  
24 *parties are entitled to may, address the proper*  
25 *apportionment of liability pursuant to subdivision (b).*  
26 ~~*Submission to arbitration under this section is not an*~~  
27 ~~*admission of liability for any other purpose or in any other*~~  
28 ~~*proceeding, including a subsequent arbitration*~~  
29 ~~*proceeding concerning the same site. The*~~

30 (8) *The department or the regional water quality*  
31 ~~*control*~~ *board, whichever issued the final remedial action*  
32 *plan, shall participate in the arbitration proceedings to*  
33 *the same extent as the potentially responsible parties*  
34 ~~*which*~~ *that have submitted to the arbitration.*

35 (b) The panel shall apportion liability for the costs of  
36 all removal and remedial actions specified in the final  
37 remedial action plan.

38 (c) In panel proceedings, liability for the costs of  
39 removal and remedial actions shall be apportioned  
40 among all identifiable potentially responsible parties

1 regardless of whether those parties are before the panel  
2 or have otherwise been released, or are immune, from  
3 liability pursuant to this chapter or any other provision of  
4 law. The panel shall apportion liability based on all of the  
5 following criteria:

6 (1) The amount of hazardous substance for which each  
7 party may be responsible.

8 (2) The degree of toxicity of the hazardous substance.

9 (3) The degree of involvement of the potentially  
10 responsible parties in the generation, transportation,  
11 treatment, or disposal of the hazardous substance.

12 (4) The degree of care exercised by the potentially  
13 responsible parties with respect to the hazardous  
14 substances, taking into account the characteristics of the  
15 substance.

16 (5) The degree of cooperation by the potentially  
17 responsible parties with federal, state, and local officials  
18 to prevent harm to human health and the environment.

19 (d) (1) The panel may issue subpoenas and subpoenas  
20 duces tecum to require *the* attendance of a person or the  
21 production of documents, at the request of any person  
22 identified as potentially responsible in the remedial  
23 action plan, on its own motion, or at the request of the  
24 department or the appropriate regional ~~water—quality~~  
25 ~~control~~ board. A person requesting a subpoena duces  
26 tecum shall comply with Section 1985 of the Code of Civil  
27 Procedure. The jurisdiction of subpoenas and subpoenas  
28 duces tecum issued by the panel extends to all parts of the  
29 state. The subpoenas and subpoenas duces tecum shall be  
30 served pursuant to Sections 1987 and 1988 of the Code of  
31 Civil Procedure.

32 If

33 (2) *If* the panel determines that a person is refusing to  
34 respond to a subpoena or subpoena duces tecum, or is  
35 guilty of a misconduct during the arbitration and  
36 negotiation process, the panel shall certify the facts to the  
37 superior court of the county in which the site is located.  
38 The court shall thereupon issue an order directing the  
39 person to appear before the court and show cause why the  
40 person should not be punished for contempt pursuant to

1 Section 1209 of the Code of Civil Procedure. The order  
2 and a copy of the certified statement shall be served on  
3 the person, and thereafter the court shall have  
4 jurisdiction of the matter. The same proceedings shall be  
5 followed, the same penalties may be imposed, and the  
6 person charged may be purged of contempt in the same  
7 way as if the person has committed a contempt in the trial  
8 of a civil action before a superior court.

9 ~~After~~

10 (3) *After* receipt of documents pursuant to a subpoena  
11 duces tecum, any party may request the panel for a  
12 continuance for a reasonable period of time to review the  
13 documents prior to proceeding with the arbitration. The  
14 panel may grant a continuance for that purpose upon a  
15 showing of good cause.

16 (e) This chapter does not require a regional ~~water~~  
17 ~~quality control~~ board or the ~~State Water Resources~~  
18 ~~Control Board~~ *state board* to engage in arbitration  
19 pursuant to this section or Section 25356.2 for any  
20 enforcement action taken pursuant to Division 7  
21 (commencing with Section 13000) of the Water Code.

22 (f) The costs of conducting the arbitration shall be  
23 borne by the potentially responsible parties submitting to  
24 the arbitration pursuant to subdivision (a), except that  
25 any filing fees, witness fees, costs of discovery, or any  
26 other costs necessarily incurred by one party shall not be  
27 shared by any other party.

28 (g) *Submission to arbitration under this section is not*  
29 *an admission of liability for any other purpose or in any*  
30 *other proceeding, including a subsequent arbitration*  
31 *proceeding concerning the same site.*